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IN THE

Supreme Court of the United States

October Term, 1962

No. 992 AND 1378 MISC.

FRANK LAINO and JOSEPH N. BOLLETTIERI,
Defendants-Appellants,

v.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH JUDICIAL DEPARTMENT

MOTION TO DISMISS

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MOTION TO DISMISS[1]

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeals in the above entitled case on the grounds that the appeals do not present substantial federal questions, and the federal question as sought to be reviewed by Defendant-Appellant Bollettieri was not raised in the Appellate Courts of the State of New York or expressly passed on.

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[1] Separate jurisdictional statements were filed in this Court by appellants Laino and Bollettieri. Since both appellants are appealing from judgments of conviction following a joint trial, and since the same record and same issues are involved in this case, a consolidated motion to dismiss is presented herewith for the convenience of the Court and avoidance of repetition in argument.

Statement

On December 1, 1961, judgments were entered in the Extraordinary Special and Trial Term of the Supreme Court of the State of New York, held in and for the County of Oneida, convicting the defendants-appellants (hereinafter called "Defendants") of the crimes of Bribery (defendant Laino), Taking Unlawful Fees (defendant Bollettiéri), Grand Larceny in the First Degree and Fraudulently Presenting Bills or Claims to Public Officers for Payment (both defendants). On November 29, 1962, the judgments of conviction were unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, without opinion. On January 3, 1963, permission to appeal to the Court of Appeals of the State of New York was denied by the Hon. Stanley H. Fuld, Associate Judge of that Court. Thereafter, and on January 25, 1963, the Hon. John M. Harlan, Associate Justice of this Court, denied defendant Laino a stay of execution in this case "in the absence of a more convincing showing that a substantial federal question exists".[2]

During the indictment period (1953-1958), defendant Bollettieri was the Superintendent of Streets and Sewers for the City of Utica. During the same period of time, defendant Laino was the managing partner of the Laino-Fisk Tire Service in the City of Utica, which firm supplied truck and other tires to the city without public bid. Due to his posi-

[2] No application for a stay of execution was presented by defendant Bollettieri. As indicated in that defendant's jurisdictional statement, defendant Bollettieri was then, and is now, in a New York State prison under execution of sentence from a prior conviction for the crimes of Grand Larceny in the First Degree and Obtaining the Proceeds of Fraudulent Audit or Payment, which incarceration followed the denial by this Court of a petition for a writ of certiorari (*Bollettieri* v. *People of the State of New York*, 366 U. S. 950).

tion, Bollettieri was able to, and did, designate the tire firm which would receive the city's substantial tire business. Bolletieri exercised this control by division of the business between the Laino-Fisk Tire Service and another firm. The City of Utica paid Laino for the tires billed at a cost of 30% to 40% in excess of the cost at which the City of Utica could have purchased tires from other sources. Defendant Bollettieri certified in writing to the city that these tires were in fact received and *pro forma* approval and payment thereafter followed by the purchasing agent, the comptroller and the treasurer of the city.

The proof on trial as to the charge of Bribery (as to Laino) and as to the charge of Taking Unlawful Fees (as to Bollettieri) was direct. In July of 1956 a local bank gave Bollettieri a loan of $2,000. In September of 1956, Laino paid off this loan with a $2,000 check. The purpose for the payment was shown to be continuation of designation by Bollettieri of the Laino-Fisk tire firm as a supplier of tires to the city and the continued certification of receipt of those tires by Bollettieri, with the resultant retention and maintenance of the substantial business by Laino and enjoyment of the exorbitant profit gained thereby.

The defendants submitted proof on trial that the 1956 loan for $2,000 by Bollettieri was but one of a series of 30 loans made by Bollettieri and paid for by Laino *in cash* in the total sum of $34,400.00. The defendants contended that Bollettieri borrowed these funds for the purpose of providing Laino with moneys for gambling. It was proved in rebuttal, however, that Laino was a man with substantial personal resources and would, financially, have no need of this subterfuge. It was further proved that Bollettieri's own personal bank accounts (four) showed a marked in-

crease far beyond his salary level during this period of time.

The proof as to the remaining counts of Grand Larceny in the First Degree and Fraudulently Presenting Bills or Claims to Public Officers for Payment was circumstantial. It was alleged that Laino billed the city for tires which he never delivered and Bollettieri certified to the city receipt of those same non-existent tires, with payment to Laino from the city resulting thereafter. To simplify presentation, proof of non-delivery was restricted by the People to a specific size truck tire for which the city was Laino's sole customer. Witnesses from the Fisk Tire Company (Laino's supplier) testified as to the inventory of the Laino-Fisk Tire Company at the commencement of the indictment period and as to the tires thereafter delivered by the Fisk Tire Company to the Laino-Fisk Tire Service. Confirmation of the proof in this regard (as to Laino solely) was obtained from admissions made by Laino before a Grand Jury, to be considered below. By this means, the People were able to show that Laino could not, and did not purchase or have on hand sufficient tires of this specific size for delivery to the city during the indictment period although billings were made to the city for alleged delivery by Laino, were approved by Bollettieri and paid.

The defendants enlarged the proof into other size tires which the city had allegedly purchased from Laino. Because of this enlargement by the defense, the People were able to demonstrate additional theft on the part of the defendants considerably in excess of the amount already proved as to the specific size tire. The main defense was that Laino in fact did have sufficient tires in inventory prior to the indictment period to deliver to the

city, regardless of lack of additional purchases during the five-year period in question.

The trial continued for an eight-week period (September 25, 1961—November 22, 1961). The trial jury deliberated for a two-day period and found the defendants guilty as charged.

Prior to the commencement of trial, Laino had appeared three times before a Grand Jury empanelled in connection with the Extraordinary Special and Trial Term of the Supreme Court held in and for the County of Oneida. His first appearance was on March 31, 1959, when he was questioned about certain aspects of the operation of his tire firm. Certain of the tire firm's books and records were also before that body, which was then inquiring into the affairs of City of Utica Deputy Chief of Police James Laino, brother of defendant Frank Laino. That police officer had previously testified before the New York State Legislative Committee on Governmental Operations that he had been a member of the defendant's tire firm—Laino-Fisk Tire Service. The Grand Jury at that point in time (1959) was attempting to ascertain the then existing relationship of Chief of Police Laino to the tire firm, since any such relationship would be a criminal violation of Section 19 of the Second Class Cities Law and Section 3 of the General City Law of the State of New York (593-594)[3]

Subsequent to this hearing, defendant Frank Laino was indicted for, and found guilty of, violation of the Tax Laws of the State of New York. This conviction was reversed by the Court of Appeals of the State of New

[3] The numbered reference is from the original record on appeal filed with this Court pursuant to the cross-designation to the notice of appeal submitted by the appellee, People of the State of New York.

York in *People* v. *Laino*, 10 N. Y. 2d 161, wherein that Court, while concluding that Laino had not obtained immunity from prosecution (because of his failure to claim his privilege against self-incrimination before the Grand Jury), at the same time held that his privilege against self-incrimination had been violated and the testimony adduced at the hearing of March 31, 1959, could not be used against him nor any leads or links emanating from it. No waiver of immunity had been requested of, or filed by, defendant Laino at that time. The Court also ruled that:

> "* * * Reindictment is possible if sufficient evidence, independent of the evidence, links, or leads furnished by the prospective defendant, is adduced to support it * * *" (*People* v. *Laino*, 10 N. Y. 2d 161 at 173).

Thereafter and on December 21, 1960, Frank Laino was again subpoenaed before that same Grand Jury. The purpose for the subpoena, the events surrounding his appearance before the Grand Jury and the proceedings subsequent thereto are briefly as follows:

In addition to being the managing partner of the Laino-Fisk Tire Service, Frank Laino was also the assistant manager of Nick Laino & Sons, Inc., which corporation had held the City of Utica garbage contract for the period 1958 through 1960 (Ex. L-Q) and for many years prior thereto. The officers of this firm were composed of other members of the defendant Laino's family, including his brothers Leo, Fred and Daniel, and a nephew, Nicholas.[4]

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[4] Prior to defendant Bollettieri becoming Superintendent of Streets and Sewers in 1952, he had become the Chief Refuse Inspector for the city on July 28, 1949 (Ex. 364) and thus was the liaison official between the city and the garbage contractor, overseeing complaints and garbage collection (Ex. 365). At that time, Nick Laino & Sons, Inc., also held the garbage contract; at that time, on October 3, 1949, the first in the series of "loans" was made by Bollettieri for $500 (2490-2494; Ex. 425).

Shortly after July 1, 1959 (the effective date of Section 103-b of the General Municipal Law) the firm of Nick Laino & Sons, Inc., became disqualified from bidding on municipal contracts for a period of five years (Ex. L-P) due to the refusal of officers of that corporation to sign limited waivers of immunity when called before the Grand Jury.[5]

In December of 1960, the City of Utica Board of Contract and Supply advertised for public bids for a new garbage contract. Three bids were submitted to the city (699). The bids, opened on December 16th, disclosed that Frank Laino was the low bidder (703-705) for that contract which would have amounted to three-quarters of a million dollars for the three-year contract period (722-723). *The next lowest bidder immediately protested that Frank Laino was not qualified to bid (705) because of his connection with Nick Laino & Sons, Inc. (710).*

Lawrence A. Tumposky, Corporation Counsel of the City of Utica, was required by the city Board of Contract and Supply to render an opinion (705). Tumposky contacted the Attorney General's office initially by telephone, and later by letter (Ex. L-P) requesting any information in the possession of the Attorney General since it was that office which had originally certified to the city that Nick Laino & Sons, Inc., was disqualified from doing business within the city (712-713). Tumposky received a reply (Ex. L-Q) which, among other matters, informed the Corporation Counsel that the Grand Jury was going to have all three bidders for the contract appear before that body and have submitted to them, prior to receiving testimony, limited waivers of immunity for signature and acknowl-

[5] These officers were the brothers of defendant Laino referred to above, Leo, Fred and Daniel, and defendant Laino's nephew, Nicholas Laino (Ex. L-Q).

edgement pursuant to Section 103-b of the General Municipal Law (716-718). The action taken by the Attorney General's office was pursuant to the Executive Order of the Governor of the State of New York (Ex. 371) which required the Attorney General to attend before Grand Juries and inquire into (among other things) any acts theretofore or thereafter committed, or alleged to have been committed, in the County of Oneida, in violation of law by any person or corporation having directly or indirectly any business, relations or transactions with the County of Oneida or political subdivisions thereof (Ex. 371, p. 2). The Grand Jury was thus inquiring as to whether or not a crime had been committed or, in the alternative, whether a crime was in the process of being committed (744-745). If the allegation concerning defendant Laino were true, defendant Laino and the corporate officers of Nick Laino & Sons, Inc., were engaged in a conspiracy to evade the effect of Section 103-b of the General Municipal Law and the due administration of the laws pertaining to bidding practices.

The Grand Jury met on December 21, 1960 and all three bidders (including defendant Laino) signed waivers of immunity pursuant to Section 103-b of the General Municipal Law and testified (757).[6]

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[6] It should be noted that this Grand Jury was the *only* body before which Frank Laino ever gave testimony. The instant indictment which resulted in the present conviction was returned by the so-called "Additional Grand Jury" before which Frank Laino *never* appeared. As to why Frank Laino was called, in December of 1960, before the Grand Jury, as opposed to the Additional Grand Jury:

> "The other [Additional] Grand Jury was inquiring into the nature of the tire sales undertaken by Laino-Fisk Tire Service and Rock's Tire & Battery during the period 1953 through 1958. It was receiving evidence from time to time in that regard in an attempt to reach a stage where it could undertake a vote. To avoid the possibility of prejudice to the defendant Frank Laino by calling him before that Grand Jury and if he then

(Footnote continued on following page)

Frank Laino's testimony[7] disclosed that for the preceding three years he had been Assistant Manager of Nick Laino and Sons, Inc., at a salary of $100 per week (pp. 5-6). In addition, he received from the corporation an annual bonus, which was not a fixed amount, Frank taking from his brothers "whatever they give me" (pp. 7-8, 34-35).

Frank Laino's duties with the corporation included:

1) receiving the numerous complaints regarding collection service;

2) checking the collection routes to see that the garbage contract was being properly performed;

3) notifying brother Dan or brother Fred[8] when an employee had to be fired;

4) making out the weekly payroll for the firm; and

5) transacting the corporation's banking business (pp. 6-7, 32-34).

During this three-year period, Frank borrowed money from the corporation, without signing any notes. The loans were either interest free[9] or the interest was "discounted"

(Footnote continued from preceding page)
refused to testify, have it then appear before that Grand Jury that he refused to testify and sign a waiver of immunity. I called him before the other Grand Jury so that that prejudicial effect, if any, would not appear before the Grand Jury that was then undertaking an inquiry concerning the tire sales of his partnership to the City of Utica." (745-746, Sworn Testimony of Robert E. Fischer, Special Assistant Attorney General In Charge.)

[7] Ex. 2 in the private inquiry. Pages noted are those of the Exhibit.

[8] Fred Laino was also Frank's partner in the Laino-Fisk Tire Service (Ex. 392).

[9] Frank Laino wonderly asked the Grand Jury:
"Could it be that they're not charging me interest?" (p. 38).

from the bonus—which bonus was itself not a fixed amount (pp. 36-37). Frank Laino explained how this could occur:

> "After all, let me put it to you this way: We are a close family" (p. 37).

His "close family" was "very well pleased" that Frank could bid for the new three-year garbage contract, since he was the only member of the corporation *not* specifically barred from bidding by the disqualification provisions of Section 103-b of the General Municipal Law (pp. 28-29). Frank made the following arrangements for his bid, after conferring with brother Dan:[10]

1) *the land* to be used for dumping, in compliance with the specifications, was owned by Nick Laino and Sons, Inc. (p. 23). Frank could either buy or lease the land, although no specific agreement had yet been made. Laino testified he could rent the land for about $200 per month, although he "could get it for less" (pp. 25-27);

2) *the trucks* to be used in performing the contract were also owned by Nick Laino and Sons, Inc., and again, Frank could either buy or lease them—though no price had been agreed upon (p. 27). Brother Dan told him that the t ucks were "depreciated and there's nothing for you [Frank] to worry about."[11] Laino testified that the corporation "could just as well give [the trucks] to me if they want to" and

[10] Whose title as an officer of the corporation was unknown to Frank; the witness also said he didn't know the name of the president of the corporation of which he was Assistant Manager (pp. 4-5).

[11] Nor, of course, would Frank Laino have to be concerned about where to house the vehicles since the offices and business facilities of both Frank Laino, d/b/a Laino-Fisk Tire Service, and Nick Laino and Sons, Inc., were at the same address (Ex. 380; 514).

Dan said "just about that. In other words, their price would be very satisfactory * * * a nominal price. Let's put it that way" (pp. 28-29).

3) *the men* who worked for Nick Laino and Sons, Inc., could also become Frank's employees under the new contract since "if I want to feel as though I can use the same help, I'll take the same help." But he felt free to hire new men. So far as hiring his brothers, who were officers of Nick Laino and Sons, Inc., he said he would first have to consult his attorney to ascertain whether or not such employment of disqualified persons would be "legal" (pp. 30-31).

4) *the money* needed for the required bond submitted with his bid was in the form of a certified check for $25,000 which he borrowed—after signing a one-year note—from Nick Laino and Sons, Inc. (pp. 31-32).

From the foregoing, it is apparent that the "close family" was using Frank Laino as a "dummy" front for the bid on the three-quarters of a million dollar garbage contract. The corporation was supplying: (1) the land; (2) the trucks; (3) the men; and (4) the money. Frank Laino was supplying solely his *name*—a name not certified as being disqualified from bidding. The protest of the next lowest bidder that disqualified persons—who had refused to discuss their business relations with the City to a Grand Jury—were in fact the low bidder on the contract had substance.

As noted above, the bids had originally been opened on December 16, 1960. At that time, the protest had been made by the second lowest bidder as to defendant Laino's qualifications to bid. The Utica Board of Contract and

Supply postponed the awarding of the contract to a special meeting to be held on December 27, 1960 (705). At the special meeting, an administrative determination was made by the City of Utica Board of Contract and Supply to award the contract to the next lowest bidder. The determination was made primarily on the basis that defendant Laino might not be able to give personal supervision to the contract (as required by the provisions thereof) due to the then pendency of a jail sentence stemming from his prior tax conviction in the New York courts (718-722). The Board of Contract and Supply, of course, did *not* have available to it the testimony given by defendant Laino before the Grand Jury on December 21, 1960 since such testimony was subject to the strict secrecy provisions of Section 952-t of the New York Code of Criminal Procedure.

Defendant Laino had signed the "limited waiver of immunity" (Ex. 1), after conferring with his attorney, Jacob Goldbas (759-760) who was also his counsel of record (and trial counsel during the private inquiry) in the trial of the present indictment below. The waiver was signed on December 21, 1960, by its terms, pursuant to Section 103-b of the General Municipal Law, a copy of which was attached to the document and incorporated by specific reference in the waiver. On signing the waiver in the presence of the Grand Jury (Ex. 2, p. 3) and acknowledging his signature before a notary public (Ex. 2, p. 3) after conference with his counsel, Laino did specifically and

> "* * * expressly waive all immunity and privilege, which I would otherwise obtain, by giving testimony herein, from indictment, prosecution, punishment, penalty or forfeiture, for or on account of or relating or in respect to any transaction, matter or thing which might be specified herein, and which specification is also expressly waived, concerning which I may testify

> or produce evidence, documentary or otherwise, in the investigation above entitled, or in any other investigation, or any inquiry, trial, action, investigation, or other proceeding before any magistrate, judge or justice, court or other tribunal, grand jury or otherwise, conducting an inquiry or legal proceeding relating to the above investigation. This waiver is limited to those matters required to be waived pursuant to Section 103-b of the General Municipal Law, a copy of which is attached hereto" (Ex. 1).

Laino, further, did specifically and

> "* * * expressly waive any and all privilege which I would otherwise obtain against the use against me of the testimony so given or the evidence so produced upon any criminal investigation, prosecution or proceeding" (Ex. 1).

Thus, Laino voluntarily and knowingly waived his privilege against self-incrimination "after a full opportunity to examine and discuss the provisions of the waiver with his attorney, including the area of inquiry" (763). At no time did Laino claim that the provisions of the waiver were not understood by him—either when he signed it, or during the trial below (763). He was thus aware that the area of inquiry would not be restricted to the garbage contract and would include *all* of his prior transactions with the City of Utica (*including the sale of tires and his tire business*) and he was specifically given permission to discuss this with his attorney before further inquiry was made. On his return to the Grand Jury room he again affirmed that he would testify pursuant to the waiver (Ex. 2, pp. 20-22). Subsequent to inquiry being made concerning the garbage contract and the circumstances surrounding the bidding by defendant Laino for that contract, inquiry was then made concerning defendant Laino and his conduct of the Laino-Fisk Tire Service, in relation to the tire sales by that firm to the City of Utica (Ex. 2).

Thereafter a further subpoena was served on Frank Laino for additional testimony before that same Grand Jury. Counsel for defendant Laino obtained an order for the People to show cause before the Supreme Court of the State of New York why the subpoena should not be quashed. Subsequent to hearing argument on the matter, the motion to quash was denied by the Court. The subpoena was issued, and the motion to quash was made, subsequent to the administrative determination made by the City of Utica Board of Contract and Supply that the garbage contract would be awarded to the second lowest bidder and not to defendant Laino. No appeal was taken from the denial of the motion to quash. Thereafter and on January 12, 1961, defendant Laino gave further testimony pursuant to the previously signed limited waiver of immunity (Ex. 3). *At no time were the disqualification provisions set forth in Section 103-b of the General Municipal Law of the State of New York ever invoked.*

Early in the trial of the action below, the Court, counsel for defendant Laino and counsel for defendant Bollettieri[12] all agreed to the method of procedure to be followed in regard to objections made by defense counsel to any evidence allegedly resulting from Laino's Grand Jury testimony of March 31, 1959 (106-118). It was there stipulated that the Court would receive allegedly objectionable evidence, subject to its thereafter being stricken *if* defendant Laino made a showing that the testimony resulted from "leads or links" furnished by Laino on March 31, 1959. All parties further agreed that such determination was solely a matter for the Court and that proceedings should be had outside the presence of the jury in a so-called "private" or "preliminary" inquiry. The objection to

[12] Both of whom are the defendants-appellants' present counsel.

the testimony given pursuant to the "waiver of immunity" was also made a matter for the private inquiry (106-118).[13]

Certain alleged federal questions presented were not preserved by defendant Bollettieri.

In Bollettieri's jurisdictional statement, it is alleged (presumably as an additional basis for this appeal) that counsel for Bollettieri was not permitted to participate in the private hearing had with regard to the alleged violation of defendant Laino's constitutional privilege against self-incrimination and the testimony given here pursuant to the waiver of immunity. It is further alleged that statements made by defendant Laino in his Grand Jury testimony were "against the appellant" Bollettieri, and objection was made by counsel for Bollettieri and a severance requested (Jurisdictional Statement of Bollettieri, p. 6). It is further alleged that counsel for defendant Bollettieri never had an opportunity to examine defendant Laino concerning the admissions of that defendant as made before the Grand Jury and as read to the trial jury. It is alleged that this testimony was used against the defendant Bollettieri, although it is noted that the Trial Court instructed the jury to consider those admissions solely as against the defendant Laino (Jurisdictional Statement of Bollettieri, p. 8).

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[13] Laino's testimony of December 21, 1960 was received in evidence in the private inquiry as Ex. 2. This *same* exhibit was thereafter received in evidence before the trial jury as Ex. 400. Likewise, his testimony of January 12, 1961 was received as Ex. 3 in the private inquiry and as Ex. 401 before the trial jury. For the purpose of the private inquiry, the exhibits were received in their entirety. For the proof of issues presented to the trial jury, only those portions of the exhibits deemed relevant were read to the trial jury and are contained in the trial record filed with this Court at pp. 1324-1373 (Ex. 400) and pp. 1374-1410 (Ex. 401).

As to the foregoing, if they are considered part of the issue on appeal regarding the question of the applicability of Section 103-b of the General Municipal Law of the State of New York, it should be noted that those issues were neither presented to, nor expressly passed upon, by the Appellate Division, Fourth Judicial Department, or by the Hon. STANLEY H. FULD, Associate Judge of the Court of Appeals (in the application as made to him), for the reason that counsel for defendant Bollettieri did not submit any brief of his position to the Appellate Division of the State of New York. Rather, counsel informed the People and the Court by telegram that he intended to submit the matter upon the brief as already submitted by counsel for defendant Laino and requested that the Court deem the Laino brief to be the brief for the defendant Bollettieri. Therefore, the People, in their brief to the Appellate Division, did not consider such matters and regardless of their merit, or lack of merit, those points were never properly raised before the Fourth Department or expressly passed by that Court, or by Judge FULD to whom application for review by the Court of Appeals was made.

ARGUMENT

I. The appeals do not present substantial federal questions.

(a) As to the Question Presented

The rather lengthy question as presented to this Court by defendant Laino (Jurisdictional Statement, pp. 3-4) appears to state the following:[14]

[14] The question as presented by defendant Bollettieri (Jurisdictional Statement, p. 3) is in more general terms but based on the same underlying facts. The following comments, therefore, as to

(Footnote continued on following page)

Laino's Premise: If a person refuses to execute a waiver of immunity when called before the Grand Jury to give testimony as to business dealings with a public agency, such person may be disqualified from entering into any further business dealings with the public for a certain period of time; defendant Laino, having already testified pursuant to a waiver of immunity when he was the low bidder on a municipal contract, was "compelled by subpoena" to testify again under the same limited waiver of immunity after having been "disqualified" from the contract by reason of its having been awarded to a higher bidder "following" the low bidder's initial appearance before the Grand Jury; Laino, now being an "ineligible" low bidder, moved to quash the subpoena compelling his further appearance pursuant to the limited waiver of immunity even though the award of the contract had already been made to another bidder, instead of Laino; the motion to quash was denied and Laino gave further testimony although his bid was then no issue; portions of such subsequent testimony were adduced on trial as admissions by, and against, defendant Laino.

Laino's Conclusion: Section 103-b of the General Municipal Law is repugnant to and violative of the "equal protection" clause of the Fourteenth Amendment, and violative of defendant Laino's privilege against self-incrimination under the Fifth Amendment to the United States Constitution as allegedly made applicable to the states by the Fourteenth Amendment.

(Footnote continued from preceding page)
Laino's contentions are submitted as being applicable to Bollettieri's contentions as well. Where Bollettieri departs from the position of Laino, *i.e.*, contending that he, Bollettieri, never had an opportunity to examine Laino for explanations of the admissions made before the Grand Jury, will be considered separately below.

Errors and Misconceptions in the Premise for the Question:

Aside from the other legal issues to be considered below, it is submitted that the premise for the question presented is improper as not being based on the facts of the case or the statute as written.

Firstly, Laino contends that he was "disqualified" from the contract after he had appeared initially before the Grand Jury and given testimony before that body, leaving the implication that his signing the waiver of immunity and his testimony had a relationship to the so-called "disqualification". This is not in accord with the facts. As the record stated above indicates, there had been no disqualification of Laino pursuant to Section 103-b of the General Municipal Law, but rather, the City of Utica Board of Contract and Supply, within the discretion imposed in that body by law, deemed it necessary to award the three-quarters of a million dollar contract to the second lowest bidder because Laino might not be able to supervise the carrying out of the provisions of the contract due to the then pendency of a jail sentence for income tax evasion. In fact, any testimony given by Laino before the Grand Jury prior to the award of bids was, and remained until trial, secret testimony with the provisions of the New York Code of Criminal Procedure; and the officials of the City of Utica were never made aware of, and had no knowledge of, the contents of this testimony.

Secondly, Laino contends that following the award of the contract to the second lowest bidder he was now an "ineligible" low bidder who was subpoenaed to appear before the Grand Jury a second time pursuant to his already signed limited waiver of immunity at a time when

there was no relevancy for the questions to be presented since he had not been awarded the contract. He further contends that the motion to quash was denied even though his "qualifications" for the contract were no longer in issue. Such contentions are not in accord with the law or the facts. Laino was at all times eligible to bid for city contracts, under the General Municipal Law, both before and after his appearance before the Grand Jury. His alleged "ineligibility" arose, as stated above, from the determination by the appropriate body of the City of Utica to award the contract to the second lowest bidder in its discretion, which if not properly exercised was the subject of separate review by the courts. If Laino, on the other hand, refused to waive immunity as permitted by the New York statutes (Penal Law § 2446), and if then "disqualified" or declared "ineligible" to bid under the General Municipal Law, the latter determination would be at issue. He chose not to do so. The statute purportedly at issue states in part as follows:[15]

> "Any person who, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, * * * refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation * * * for a period of five years after such refusal or until such a disqualification shall be removed * * *." (Section 103-b of the General Municipal Law).

[15] The statute in its entirety is set forth on pp. 4-5 of Laino's Jurisdictional Statement.

By the terms of the statute, no present or pending contract need be in issue in order to have testimony adduced from one who has had prior business dealings with the public.[16] The origin of the statute is the following:

> "The Extraordinary Grand Jury conducting an investigation in Ulster County, on January 28, 1959 handed up a presentment pointing out that its inquiry had been blocked by the refusal of persons who had been selling merchandise and equipment to the county to give testimony about their dealings with public officials. It recommended legislation to meet that problem. This bill is such legislation." (Memorandum of the Attorney General, New York State Legislative Annual, 1959, p. 148)."

The Governor, on approving both Sections 103-a and 103-b of the General Municipal Law, stated the following:

> "Unlike the private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some *prior* contract with the public. Likewise, it would seem appropriate that public contracts should provide that the benefits accruing under them be available only so long as the beneficiary is willing, when required by a grand jury, to disclose any information he may have as to a public contract." (Message of the Governor, McKinney Session Laws of New York, 1959, pp. 1757-1758).

Thus, although the City of Utica had turned down Laino's bid on the garbage contract (for reasons other

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[16] Section 103-a of the General Municipal Law, a companion statute to the one in issue, provides for the insertion in present and future contracts of a clause providing for testimony by the recipient as to dealings with the public; failure to do so can result in cancellation of that contract (with payment to date) and future disqualification. This statute is not involved in the case at bar.

than his appearance before the Grand Jury), it was still incumbent upon, and proper for, the Grand Jury to inquire into Laino's dealings with the public and criminal conduct in that regard. Laino at no time stated to the Grand Jury that he was withdrawing his previously signed waiver of immunity and at no time refused to answer questions concerning his prior tire transactions (having the advice of his own personal counsel as to this matter). The issue thus never arose as to whether or not the disqualification provisions of Section 103-b of the General Municipal Law should be applied.[17]

What Laino suggests in his premises for the questions as presented to this Court is that he can execute a waiver of immunity before a grand jury with unstated mental reservations and conditions, and give as much testimony as he deems necessary for his purposes; and then, if the facts external to the grand jury inquiry (rejection of his bid) require withdrawal of his waiver before that body, he can take the position that the grand jury has no further power of inquiry since his personal purpose in execution has been fulfilled. He is suggesting, therefore, conditional compliance with the statute for only so long as it serves his private economic reasons; and non-compliance with the statute if his economic reasons are no

[17] As the Trial Court below stated:

"Either the statute was a constitutionally valid and effective exercise of legislative authority to lay down conditions applicable to those seeking public business, or it was unconstitutional and ineffective for any purpose, thus posing no coercive threat to the defendant.

* * *

Had the defendant refused to sign on advice of counsel or otherwise, then upon the penalty provisions being invoked, defendant might assert the constitutional question now raised. The provisions of the statute never having been invoked, we are not now concerned with its constitutionality." (762-764).

longer served. It is submitted that this is the classic example of an individual wanting his "cake" before the law but also, by the same token, wanting to "eat" that same cake. It is respectfully submitted that no statute, state or federal, can be considered or dealt with in this manner.

(b) As to the Equal Protection Clause

In accordance with his theory that the waiver of immunity is effective only so long as he has something to gain thereby (the contract), defendant Laino urges (Jurisdictional Statement, pp. 10-11) that the statute has no reasonable legislative purpose in the facts of this case where testimony is sought from the defendant "even after the State is no longer in need of a protection which the statute was designed to afford". It is submitted that this conclusion of fact is erroneous.

As was noted above, the purpose of the statute is not to "test" the qualifications of bidders for public contracts but rather to ascertain from those individuals who choose to do business with a public agency, whether their business is or has been conducted in violation of criminal statutes.

Thus, regardless of the fact that the City of Utica Board of Contract and Supply made an administrative determination not to award the garbage contract to defendant Laino the grand jury then inquiring still had a continuing duty and obligation to ascertain whether Laino's prior business with the public had resulted in, or was a result of, any criminal activities. Defendant Laino's apparent purpose in executing the waiver of immunity was so that no disqualification would occur in relation to his bid on the garbage contract. To call this, in Laino's terms, a "threat of economic sanction" is to assume that defendant Laino

had an actual right to engage in business for, and on behalf of, the public and to obtain profit therefrom in any manner, lawful or unlawful. Defendant Laino would thus consider his business relations with the public to be different in scope from any business relations he might have with a private firm. To extend the present argument to its logical result would be to conclude that he had and does have an absolute right to do business with any private person he desires—without regard to the wants and desires of that person. Certainly any private firm would have the right and privilege to inquire into the past performance of its contracts with a contractor such as Laino; and if contractors such as Laino refuse to discuss with such private firm and report on their prior relations, such private firm would have the absolute right, in the protection of its business, to refuse to do business with them. It is submitted that a municipal corporation, or any other government agency, also has the same right—a government can also establish rules and regulations in the form of statutes demanding that one with whom it has dealt account for its transaction of public business; and if that individual (such as defendant Laino) refuses to sign a waiver of immunity or refuses to answer questions, to thereafter refuse to do business with such an individual.

It is apparent that government has an obligation beyond that of a private corporation. Government is concerned with the protection of its people at large and is vitally concerned in that regard with the activities of an individual which are deemed criminal in nature. Where a private corporation might disregard the activities of defendant Laino, a governmental unit cannot. The people of the state not only need protection from corruption in the conduct of present contracts but from prior criminal dealings in the maintenance of law and order. Thus, it is

submitted, defendant Laino's conclusion that once the contract he sought was awarded to another bidder by administrative act, that such event automatically curtailed the interest of the state in him, is in conflict with the purpose and policy of the statute. The statute, it is submitted, sets forth reasonable requirements which are wholly relevant to the achievement of the state's lawful objectives. The standards as used by this Court in evaluating a statute under the Equal Protection Clause were recently re-stated in *McGowan* v. *Maryland*, 366 U. S. 420 (upholding the Sunday Closing Laws of Maryland):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of a state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (*McGowan* v. *Maryland*, 366 U. S. 420 at 425-426).

In support of his position, defendant Laino points to the concurring opinion of Mr. Chief Justice Warren in *Regan* v. *New York*, 349 U. S. 58. In that decision, which concerned a police officer from New York City and the application of Section 903 of the New York City Charter, Mr. Chief Justice Warren stated by way of *dicta*:

> "After a city employee suffers the primary sanction of the constitutional and charter sections—namely, loss of his position—it may well be that the waiver cannot be used to send him to the penitentiary for bribery when the same sanction would not be imposed on other witnesses giving like testimony." (*Regan* v. *New York*, 349 U. S. at 66.).

Regardless of the future application of the comments of Mr. Chief Justice WARREN, it is submitted that such language, and the Chief Justice's prior reference in that decision to the equal protection clause, has no bearing on this case since the penalty provisions of Section 103-b of the General Municipal Law *were not invoked*. The above quoted language might very well apply to a situation where *double* sanctions are imposed: *i.e., first*, loss of position; and *second*, use of self-incriminating testimony for conviction of a substantive crime. In the instant case, the contract was not lost by use of the statute; the admissions of defendant Laino were obtained after voluntary execution of a waiver of immunity and without invocation of the penalties of contempt. As noted by Mr. Justice REED in the majority opinion of the *Regan* case, *supra* (where the penalties of contempt were in fact invoked):

> "First, *assume that the waiver was valid. Any testimony which the petitioner gave could then have formed the basis for a subsequent prosecution*, and the state would here be punishing the petitioner for his refusal to provide such self-incriminating testimony. But, since we are assuming the validity of the waiver, *such a situation would be simply the result of a voluntary choice to waive an immunity provided by the state.*" (*Regan* v. *New York*, 349 U. S. at 62, emphasis supplied.)[18]

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[18] *Cf., Emspak* v. *U. S.*, 349 U. S. 190 at 195 (Op. by Mr. Chief Justice Warren:

> "If the witness intelligently and unequivocally waives any objection based on the self-incrimination clause * * * he cannot later invoke its protection in a prosecution for contempt for refusing to answer that question."

See also, *Cohen* v. *Hurley*, 366 U. S. 117 at 126, wherein this Court denied a claim of violation of the equal protection clause wherein a New York lawyer had raised his privilege against self-incrimination in a judicial inquiry and was thereafter disbarred for refusing to cooperate with the court.

The foregoing discussion has been based on *Laino's* assumption that he was a member of a different class of persons than the public at large. To the contrary, Section 103-b of the General Municipal Law does not specify any *particular* class of persons who might be affected by its provisions. Rather, the statute is directed to *any person* who might have engaged in commerce, by way of transaction or contract, with the public groupings named in the statute. This is in contra-distinction to the *Regan* situation where a police officer was affected by Section 903 of the New York City Charter, which *does* apply to specific classes named therein: "councilman or other officer or employee of the city". Thus, Section 103-b of the General Municipal Law does not "deny to any person within its [the State's] jurisdiction the equal protection of the law." Quite the opposite, the statute applies to *all* persons within the jurisdiction of the state if those persons have had business dealings with a body politic and thus all persons who engage in that conduct receive the same and "equal protection" of the statute. The *reductio ad absurdum* of defendant's position would be to assert that a penal statute, which, *e. g.*, makes bribery of a public officer a crime, is violative of the equal protection clause because not everyone engages in that form of conduct. It is respectfully submitted that defendant Laino's position is not in accordance with this Court's construction of the meaning of the constitutional mandate of "equal protection of the laws."

(c) As to the Alleged Testimonial Compulsion

Defendant Laino also urges (Jurisdictional Statement, pp. 12-14) that Section 103-b of the General Municipal Law, as applied below, is violative of his constitutional privilege against self-incrimination. While recognizing that

his position is at variance with a long line of cases of a majority of this Court, running the gamut from *Twining* v. *New Jersey*, 211 U. S. 78 through *Cohen* v. *Hurley*, 366 U. S. 117, defendant Laino submits that this Court should reverse itself and its long history in this field and take away from the states their power to enact legislation dealing with the privilege against self-incrimination. Aside from the fact that defendant Laino's present assertion of testimonial compulsion is hypothetical since there was no *compulsion* of testimony but rather a *voluntary* waiving of his privilege against self-incrimination and the voluntary giving of testimony thereafter, it is submitted that this Court has already established a tentative line of demarcation between proper and improper actions on the part of a state in this field. Thus this Court pointed out in *Cohen* v. *Hurley*, 366 U. S. 117:

> "This is not to say, of course, that states have free rein either in the choice of means of forcing incriminating testimony, or in the drawing of inferences from a refusal to testify on grounds of possible self-incrimination, no matter how objectionable or irrational. *But these decisions do establish, at the very least, that to make out a violation of the Fourteenth Amendment, something substantially more must be shown than that the state procedures involved have a tendency to discourage the withholding of self-incriminatory testimony.*" (*Cohen* v. *Hurley*, 366 U. S. 117 at 129, emphasis supplied.)

It is respectfully submitted that even if the circumstances of this case involved a matter for determination as a federal constitutional right under the Fourteenth Amendment (as opposed to being purely a state right), that defendant Laino has made no substantial showing, or any showing, that the state procedures here involved had any tendency to discourage the withholding of self-in-

criminating testimony. Rather, the state procedures adopted via the General Municipal Law establish a method whereby the public could ascertain if its business was being conducted without criminal violation. If a businessman agrees to give that testimony in order to do further business with the public body, he must fully account to that public (through its grand jury) and cannot retract the consent given when he has attained his financial purpose. It is not a question of balancing public and private interests in this present case, but rather of having both sides—the businessman and the public—treated with equality in the conduct of public business. The statute gives the public the right to enquire of the manner of conduct of its business while retaining for the public contractor the right to pursue public business if he so accounts.

II. Additional issues raised by defendant Bollettieri were not raised in the Appellate Courts below or expressly passed on.

Aside from relying fundamentally on the position set forth in the Laino Jurisdictional Statement, defendant Bollettieri also urges that he was not allowed to participate or cross-examine in the private inquiry; that statements made by co-defendant Laino in the form of admissions before the Grand Jury might as well have been used by the jury as against the defendant Bollettieri (even though the Court instructed the trial jury to the contrary); that defendant Bollettieri never had an opportunity to cross-examine co-defendant Laino as to those admissions made by Laino before the Grand Jury.

The matters in the private inquiry related solely to Laino and counsel for defendant Bollettieri stipulated, as noted above, that the inquiry should be outside the pres-

ence of the trial jury. Counsel for defendant Bollettieri was not restricted from raising those same issues before the trial Court or jury if he so desired.[19]

Further, the foregoing issues were not raised in the Appellate Courts of the State of New York or expressly passed on by those courts. As noted in the statement of facts, defendant Bollettieri submitted no brief to the Appellate Division, Fourth Judicial Department, but rather relied on the brief as submitted for defendant Laino which did not raise those issues. As a result, the People in their brief as respondents in that Court, also did not consider those issues in argument before that Court. Thus, the Appellate Court was not in a position to, and did not, pass on those issues. Nor were any papers presented by counsel for Bollettieri to the Hon. Stanley H. Fuld, Associate Judge of the Court of Appeals, for his determination in considering whether or not to grant permission to the defendants to appeal to that Court. It is submitted, therefore, that the foregoing issues are neither federal questions, nor were they raised below; that a motion to dismiss is proper in this instance on the basis that they were not considered below.

> "The fact that the federal question was timely and properly raised in the state trial court will not suffice to authorize the Supreme Court to consider it if the question was not again urged on the appeal to the state appellate court. In such case the federal question will be deemed to have been waived and will not support jurisdiction in the Supreme Court." (Wolfson & Kurland, *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States* [1951]

[19] It should be noted that defendant Laino did not testify on trial either during the inquiry before the trial jury or the inquiry during the private proceedings. The matter in the private proceedings was solely a question of law for the Trial Judge to determine, which was agreed to and stipulated to by all parties.

Section 70, and cases cited therein. See also, Stern and Gressman, *Supreme Court Practice* [3d Ed., 1962] p. 97.)

Conclusion

It is respectfully submitted that the appeals should be dismissed on the grounds that the appeals do not present substantial federal questions, and the federal question as sought to be reviewed by defendant Bollettieri was not raised in the Appellate Courts of the State of New York or expressly passed on.

Respectfully submitted,

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